Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
Review of the Broadcast National Television Ownership Rules	)	MM Docket No. 96-222
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-7
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

REPLY COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

Does broadcasting need the FCC's help to survive? Here's what broadcasters really think:

Why didn't the explosion in channel choices across cable and satellite spectrum diminish the allure of broadcast television?...First, cable has come to be viewed by savvy marketers not as a competitor to broadcast television, but as a complement to it....[T]he advertising capabilities that the two offer are markedly different. Each cable network's strength is delivering a niche audience over time, while each broadcast network delivers a mass market fast and often. ****Second, with increased choices in everything...only strong brands will prosper. For example, the powerful Peacock brand makes possible a symbiotic relationship between NBC's cable and broadcast propertiesThird, the notion of broadcast television's "declining share" has obscured the reality of tremendous growth. The size of the audience pie continues to expand. If NBC's current Thursday lineup had captured the same number of viewers in the early 70's that it does today, it would have resulted in a 30 rating and a 50 share. Fourth, the increasing fragmentation of society-and the audience-makes broadcast television even more valuable. To make the next sale, an advertiser has to reach all the ready to buy consumers. Broadcast television reaches 97 percent of U.S. homes every week.***

Neil Braun, President, NBC (March 17, 1997)

Of Counsel:
Angela J. Campbell
Karen M. Edwards
Randi M. Albert

INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001-2022

Gigi B. Sohn
Andrew Jay Schwartzman
Joseph S. Paykel

MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, DC 20036
(202) 232-4300
Counsel for MAP, et al.

March 21, 1997

TABLE OF CONTENTS

SUMMARY ii

INTRODUCTION 1

I. THE COMMISSION SHOULD NOT RELAX THE DUOPOLY RULE 4

A. Nothing in the Plain Language or Legislative History of the 1996 Act Mandates That the Commission Relax the Duopoly Rule 6

B. The Existence of Multichannel Competitors Does Not Necessitate Relaxation of the Duopoly Rule 8

1. Broadcasters have overstated the existence of multichannel competition, and the diversity of viewpoint they provide 9

2. Broadcasters ignore the imminent conversion to digital television 14

C. Unsubstantiated Promises of Public Service Are Not an Adequate Basis Upon Which the Commission May Relax the Duopoly Rule 15

II. THE COMMISSION HAS THE AUTHORITY, AND THE DUTY, TO PROHIBIT LMAs EXCEPT IN THE MOST COMPELLING CIRCUMSTANCES 17

A. Under the Plain Language of the 1996 Act, the Commission May Refuse to Grandfather LMAs, and May Limit Them to Their Current Terms 17

B. Those Broadcasters Which Entered Into LMAs Did So at Their Own Risk 19

C. Waivers for LMAs Should Be Granted Only Upon a Detailed Showing that the Benefits of an LMA Would Result in Palpable Public Interest Programming Benefits 22

III. The Commission Must Count Intermarket Satellites for Purposes of the National Ownership Rules 23

IV. It is No Longer Necessary to Discount UHF Stations for the Purpose of the National Ownership Rules 25

CONCLUSION 26

SUMMARY

In considering whether to ease TV duopoly and other ownership rules, the Commission should view broadcasting's prospects as broadcasters ***really*** see them. While some broadcasters have told the FCC that competition from other multichannel providers necessitates relaxation of the multiple ownership rules, that is not what they say to each other, or to Wall Street. Here is what NBC Television President Neil Braun really thinks:

> ***"[T]he notion of broadcast television's "declining share" has obscured the reality of tremendous growth. The size of the audience pie continues to expand. If NBC's current Thursday lineup had captured the same number of viewers in the early 70's that it does today, it would have resulted in a 30 rating and a 50 share."***

At the outset, it is especially important to note that much of the broadcasting industry has ***not*** joined in the demand for permitting fewer, larger companies to dominate their industry. While these reply comments respond to those who do make such arguments, the silence of many others is important testimony supporting the existing framework.

Of those broadcasters which do seek to lift ownership limitations, none can demonstrate benefits that outweigh the diminished viewpoint diversity this would bring, or that retaining the current rules will cause them harm. They completely ignore compelling indications that the industry will only get stronger *vis à vis* its competitors, with or without changes in ownership policies. The most critical of these omissions is that ***broadcasters will soon become local multichannel providers themselves when they convert to digital transmission in the next several years.*** The failure even to mention digital TV, and the increased advertising revenues they will bring, as well as entirely new revenue streams which will come from subscription fees, is indicative of a "win-at-all-cost" attitude which ill-serves broadcasting or the nation.

There is no statutory or other reason compelling the Commission to relax the duopoly

rule. The plain language of Section 202(c) of the Telecommunications Act could not be more clear - the Commission may choose either "to ***retain***, modify or eliminate" the rule. Nor does the mere existence of other multichannel competitors provide any justification for relaxation or change. ***None*** of these competing services are available, for free, to essentially 100% of the American people. ***None*** are required, by law, to serve their local communities. And ***none*** of them command the level of advertising revenues that broadcasting does.

However welcome it may be, the emergence of new multichannel providers does not counteract the loss of diversity which would accompany relaxation of the duopoly rule. The fact that several different technologies may soon deliver programming does little to change this, since multiple and cross ownership of these distribution technologies means that their programming will be under common editorial control of the same entities now dominating the program production. And, although the number of broadcast stations has doubled, increasing multiple ownership may have actually ***decreased*** the number of independent voices.

If the Commission were to liberalize waiver policies for duopolies, it should do so only in compelling circumstances, and only when applicants make specific, ***enforceable*** and reviewable promises of additional programming that goes beyond the "public interest programming" already required of them. Unsubstantiated, self serving promises that cost savings will be shared with the public are worthless.

Parties urging that the Commission grandfather old LMAs and permit new ones have similarly failed to show that there are statutory or equitable reasons to do so. Section 202(g) requires grandfathering only where they are "in compliance with the rules of the Commission." LMAs evade the ownership rules, and facilitate unauthorized transfers of control; this is against

FCC rules, and is thus impermissible.

Arguments that current LMAs were created with "reasonable reliance" on bad legal advice are, at the least, insincere. The dubious legality of LMA's has been the subject of frequent and public discussion at the FCC, the trade press and elsewhere for six years. Those who used such transparently evasive tactics were on full notice that they were at risk. Commission action outlawing the practice would not be "retroactive," and would in no event be inequitable.

As to TV satellites, no reason has been advanced as to why the Commission should not count intermarket satellites for purposes of the national ownership rules. While intramarket stations provide local benefits, intermarket stations do not. Such stations merely serve as a vehicle for distant broadcasters to extend their ownership reach outside the scope of the attribution rules applied to others.

Finally, the Commission should eliminate its UHF "discount" for purposes of the national ownership rules. The discount benefits only the largest group owners, some of which may be approaching the 35% audience reach limitation. Most of these stations are carried on cable systems. With the advent of digital TV, any technical or economic disadvantages will soon be eliminated.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Review of the Commission's Regulations Governing Television Broadcasting	)))	MM Docket No. 91-221
Broadcast Television National Ownership Rules	)))	MM Docket No. 96-222
Television Satellite Stations Review of Policy and Rules	)))	MM Docket No. 87-7
Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-8

REPLY COMMENTS OF MEDIA ACCESS PROJECT, *et al.*

Media Access Project, Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights and Women's Institute for Freedom of the Press (MAP, *et al.*) respectfully submit this reply to comments filed by various broadcasters advocating modification or relaxation of the duopoly and other ownership rules in the above referenced dockets.[1]

INTRODUCTION

Broadcasters demanding relaxed ownership rules predict the end of free, over-the-air broadcasting because of competition from other multichannel video providers. But that is not

[1]As discussed below, there is no consensus among broadcasters as to how much ownership deregulation is good for the public or for the industry itself. For the most part, these reply comments respond to the broadcasters who advocate the greatest relaxation of the rules. For purposes of these reply comments, those parties will be referred to as "the broadcasters," although the reference is not intended to refer to the entire broadcast industry.

what they tell each other. Neil Braun, President of the NBC Television Network, has recently explained why broadcasting has a bright future:

> ***Why didn't the explosion in channel choices across cable and satellite spectrum diminish the allure of broadcast television?...First, cable has come to be viewed by savvy marketers not as a competitor to broadcast television, but as a complement to it....[T]he advertising capabilities that the two offer are markedly different. Each cable network's strength is delivering a niche audience over time, while each broadcast network delivers a mass market fast and often.****Second, with increased choices in everything...only strong brands will prosper. For example, the powerful Peacock brand makes possible a symbiotic relationship between NBC's cable and broadcast properties***Third, the notion of broadcast television's "declining share" has obscured the reality of tremendous growth. The size of the audience pie continues to expand. If NBC's current Thursday lineup had captured the same number of viewers in the early 70's that it does today, it would have resulted in a 30 rating and a 50 share. Fourth, the increasing fragmentation of society-and the audience-makes broadcast television even more valuable. To make the next sale, an advertiser has to reach all the ready to buy consumers. Broadcast television reaches 97 percent of U.S. homes every week.***

Neil Braun, "Why cable hasn't killed broadcasting" (Guest Commentary), *Electronic Media*, March 17, 1997 at 16.

In assessing the record in these dockets, the Commission should keep such perspectives in mind. It should also take note of the uncharacteristic dissension within the industry over the notion of vastly increased concentration of control. *E.g.*, Post-Newsweek Comments at 2-3; Viacom Comments at 7, ABC Comments at 14-15. *Compare, generally*, Paxson Communications Comments; Sinclair Broadcasting Comments.

Thus, the Commission should act with the utmost caution in this docket, and reject any claim that there is a "consensus" as to whether the Commission should, or needs to, significantly modify its local ownership rules. . *See* Association of Local Television Stations ("ALTV") Comments at 9.

Those broadcasters advocating substantial relaxation of the Commission's multiple ownership rules have not met their burden of demonstrating that such changes are in the public interest. They have failed to show that TV duopolies would not diminish viewpoint diversity or that the broadcasting industry would suffer if the rules were not changed. Moreover, they have not demonstrated that carefully crafted, narrow waivers of the duopoly rule that result in real, and not promised, public interest programming would not be more beneficial to the public than flat-out exceptions that permit both good and bad actors to benefit from common ownership.

Significantly, a number of the broadcasters' filings suffer from a number of critical omissions, misstatements and exaggerations about the state of the television broadcast industry and the multichannel video marketplace in which they compete. In some of the more common of these, broadcasters

- **Ignore the consolidation that has already taken place, and continues to take place, in broadcasting.**
- **Overstate the number and power of current multichannel video competitors, and understate the extent to which broadcasters also have ownership interests in these competitors.**
- **Fail to mention how digital television technologies promise to convert broadcasters from single channel to multichannel providers.**
- **Presume that relaxation of the duopoly rule will result in only one such combination in each local market.**
- **Make unsubstantiated promises of public benefits from economies of scale that would result from common ownership.**

In the interest of engaging in full and accurate debate, MAP, *et al.* discuss these points in detail below, and urge the Commission to assess each carefully before embarking on a course of action that could lead to an irreversible diminution in viewpoint diversity and opportunities for entry by minorities, females, and other new entrants.

Finally, MAP, *et al.* urge the Commission to reject the twin notions promoted by some broadcasters that diversity of ownership does not lead to a diversity of viewpoint, *e.g.* HSN Comments at 3, Local Station Ownership Coalition ("LSOC") Comments at 46, and that such a connection must be "proven" by empirical evidence. *E.g.*, Paxson Comments at 3; NBC Comments at 11. The proposition that diversity of ownership leads to diversity of viewpoint need not be proven -it is self evident that one editor cannot have two viewpoints on any one matter. When faced with the very same argument in the context of the newspaper/broadcast cross ownership rules, the Supreme Court stated:

> "[D]iversity and its effects are...elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds"....In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergence of their viewpoints cannot be expected to be the same as if they were antagonistically run."

FCC v. NCCB, 436 U.S. 775, 796-7 (1978) quoting *NCCB v. FCC*, 555 F.2d 938, 962 (D.C. Cir. 1977) [Citations omitted].

I. THE COMMISSION SHOULD NOT RELAX THE DUOPOLY RULE

In its Comments filed in this proceeding, MAP, *et al.* cautioned against making radical changes to its ownership rules because the Commission has not had time to assess the effect of "the recent and dramatic changes in broadcast ownership in this country." MAP, *et al.* Comments at 4. Yet, despite the fact that the Telecommunications Act of 1996 ("the Act") lifts all limits on the number of television stations one entity can own nationally, eliminates the cable-network cross ownership restriction, relaxes the one-to-a-market and dual network rules, extends broadcast license terms and gives broadcasters free spectrum for digital television, many of the broadcasters deliver their viewpoints as if the Act had never been passed. Their comments continually depict broadcasters as "single channel" entities who need ownership relief to compete fairly against "largely unregulated or deregulated" competitors. NBC Comments at 1-2; *see* NAB Comments at 5.

These characterizations are absurd. The days of the "single channel" broadcaster are over, for good. The roster of the Local Station Ownership Coalition, which represents so-called "small" broadcasters, reflects that fact. LSOC Comments at i-vi. And, as will be discussed in more detail below, the imminent conversion to digital television will turn every broadcasting station into a multichannel video provider in its community. Nor are their major multichannel competitors "unregulated." Cable system owners are subject to horizontal and vertical limits on ownership, and must provide capacity to unaffiliated programmers *via* commercial leased access. And DBS providers have been made subject to public interest obligations and are required to set aside channel capacity for noncommercial, educational uses. Unlike these multichannel competitors, however, broadcasters have, and will continue to get their distribution systems from the American public. For *free*.

Proponents of greatly increased ownership are equally unforthcoming as to the effects of relaxing or eliminating the duopoly rule. For example, LSOC denies that "viewpoint monopolization" would flow from the merger of two television stations. LSOC Comments at 54. But the fact of the matter is that relaxing the duopoly rule would permit more than one merger of two stations in a market. Rather, it would permit several such combinations, so that if some of the Commenters had their way, there might be as few as 4 independently owned television voices (commercial and noncommercial combined) in a market, Paxson Comments at 14, or one entity owning up to 50% of the television stations in a market, provided that no more than one of the stations is a VHF station. Sinclair Comments at 11.

For these reasons, MAP, *et al.* reiterate the plea contained in their initial Comments - the Commission should wait until the dust settles from the 1996 Act and the grant of digital television licenses. There is no rush - and certainly no mandate - to change the rules now.

A. Nothing in the Plain Language or Legislative History of the 1996 Act Mandates That the Commission Relax the Duopoly Rule.

LSOC argues that "Congress directed the Commission to" relax the duopoly rule and quotes several isolated statements by members of Congress wishing that result. LSOC Comments at 6, 14-20. The NAB similarly argues that Congress "clearly expected that the Commission would make changes in the television duopoly rules." NAB Comments at 8.

But the plain language and legislative history of the Act point to an entirely different result. Section 202(c)(2) of the Act requires the Commission merely to conduct a "rulemaking proceeding to determine ***whether to retain, modify or eliminate*** its limitations on the number of television stations" that can be owned or controlled in the same market. [Emphasis added]. Congress required the FCC to do no more than conduct a rulemaking. The plain language is clear that the Commission has a choice - it can retain, modify or eliminate the rules. Any other reading renders the word "retain" meaningless.

While the plain language of the Act is dispositive in determining Congressional intent, *see Chevron USA v. NRDC*, 467 U.S. 837, 842 (1984), the legislative history cited by LSOC and NAB is no more supportive of their argument. Statements of Senator Ford and others may have expressed their personal wishes that the rules be changed, but they did not speak to the meaning of Section 202(c). The last line of the quoted passage from Senator Ford's statement is telling: "It is my ***hope*** that the FCC will...revise the duopoly rule." 142 Cong. Red S705 (February 1, 1996) (Statement of Senator Ford) [Emphasis added].[2] The colloquy between Chairman Fields and Rep. Stearns is no more persuasive - the two variously say that the FCC "should revise the rule as is necessary," "should consider granting waivers," and that broadcasters will be disadvantaged "*if* we do not relax the duopoly rule." 142 Cong. Rec. H1164 (February 1, 1996). This is not the language of mandate.

As the broadcasters well know, Section 202(c) was a compromise that resulted after much fighting between Democrats and Republicans over the extent of ownership deregulation. *See* 104 Cong. Rec. H 1169 (February 1, 1996) (Statement of Rep. Markey) ("The conference report on S. 652 reflects a series of compromises I raised to HR 1555 when it was approved by the House last August****The conference report on S. 652 is most improved in its treatment of mass media ownership issues. I had battled and fought against the mass media provisions of H.R. 1555 because I felt that such provisions indiscriminately repealed rules that helped protect important values such as localism and diversity"). The House Bill, as passed, would have modified the duopoly rule. But in the end, the full Congress determined ***not*** to take such action - and instead chose only to require the Commission to review the duopoly rule under the public interest standard. *E.g.,* Joint Explanatory Statement of the Committee of Conference at 161-163 ("Section 337(b)(2) [of the House Bill] sets forth the circumstances under which one entity may

---

[2]The colloquy between Senators Inouye and Hollings is even less persuasive. It is obvious that the Senators were referring to modifying the duopoly rule as it applies to Hawaii only. 104 Cong. Rec. S 705-706 (February 1, 1996) (Senator Hollings: "Many of our concerns about combinations involving two VHF stations in local markets in the continental United States do not apply to Hawaii. The FCC should recognize this distinction when considering the duopoly rule").

own or operate two television stations in a local market****Subsection [202](c)(2) [of the Conference Agreement] directs the Commission to conduct a rulemaking proceeding to determine whether its rules restricting ownership of more than one television station in a local market should be retained, modified or eliminated.")[3]. *See, also* 104 Cong. Rec. 1176 (February 1, 1996)(Statement of Rep. Collins) ("[T]his conference report keeps intact current restrictions that prevent one media giant from owning two television stations in one locality....").

B. The Existence of Multichannel Competitors Does Not Necessitate Relaxation of the Duopoly Rule.

Most broadcasters point to the existence of other multichannel providers as justification for relaxation of the duopoly rule. *E.g.*, NBC Comments at 3-7; NAB Comments at 5-7; ALTV Comments at 5-8. They characterize themselves as "single channel" providers, *e.g.*, NAB Comments at 7; LSOC Comments at 76; ALTV Comments at 7, fighting an uphill battle against "unregulated" or "deregulated" multichannel video providers like cable, DBS, OVS, MMDS and SMATV. *See* HSN Comments at 12; NBC Comments at 2. Some also consider the Internet a competitive threat. *E.g.*, NBC Comments at 7; NAB at 6; LSOC Comments at 40. The broadcasters also point to these media in arguing that there is adequate viewpoint diversity in local markets. *E.g.*, ALTV Comments at 13; NBC Comments at 4; NAB Comments at 6.

But the mere existence of these competitors does not, alone, require relaxation of the duopoly rule. As NBC President Neil Braun brags, *see* pp. 1-2, *supra*, ***none*** of these competitors are available, for free, to essentially 100% of the American people. *None* of them are required,

[3]Significantly, this language shows that the House version was rejected. This nullifies any value the House Report might have had. Thus, LSOC's citation to the House Report has no [redacted]

by law, to serve their local communities. And ***none*** of them demand the kind of advertising revenues that the broadcast industry does. *See* Rich Brown, "Cable isn't getting big ad bang for original buck (Perth says advertisers have yet to sufficiently reward ambitious programming efforts)," *Broadcasting & Cable*, January 20, 1997 at 50; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 96-496 (January 2, 1997) (*Competition Report*) at ¶86 ("For the new season which began on September 15, 1996, ABC, CBS, Fox and NBC received a record $5.8 billion in pre-season advertiser commitments,..."). As discussed below, the broadcasters have not made the case that they, or the American people, are being harmed in any way from this competition, or that diversity would not be lessened if the duopoly rule were to be modified or eliminated.

1. Broadcasters have overstated the existence of multichannel competition, and the diversity of viewpoint they provide.

The broadcasters list an alphabet soup of multichannel video providers, to argue that without duopoly relaxation, those competitors will have an unfair advantage. *E.g.*, NAB Comments at 5-7; LSOC Comments at 34-38; NBC Comments at 2-7. They also claim that these competitors, and the doubling of the number of television stations over the past 30 years, provide enough viewpoint diversity so as to minimize the effect of any diminution of diversity caused by relaxation of the duopoly rule. *E.g.*, NBC Comments at 3; ALTV Comments at 4.

But none of the competitors to which the broadcasters refer have the reach or popularity of broadcasting. As LSOC itself says, cable may be available to 96% of the homes and DBS to 100%, but only 65% of the American public subscribes to cable,[4] and only 4% to DBS.[5]

[4]"Even in cable homes, programming originating on local broadcast television stations accounted for a combined 61% share of all day viewing in the 1994-95 season,..." *Competition*

LSOC Comments at 35. And, while LSOC claims that some cable and DBS channels "achieve a viewing share comparable to that of their broadcast competitors," it supports that claim merely by reciting the Commission's finding the two ***smallest*** television networks, UPN and the WB, had a combined prime time share of 9 in 1995-96[6] LSOC Comments at 36. But, in a head-to-head comparison even these young networks beat their cable competitors. In the week of March 3-9, for example, UPN and the WB had a combined 5.9 rating. Peoples Choice, *Broadcasting & Cable*, March 17, 1997 at 46. In that same week, the highest rated cable television *program* (Nickelodeon's *Rugrats*), averaged a 2.8 rating. *See* Peoples Choice: Top 50 rated Cable Shows, *Broadcasting & Cable*, March 17, 1997 at 100. This rating does not take into account of the rest of Nickelodeon's prime time schedule.[7]

The other multichannel video competitors most often mentioned, OVS, MMDS and SMATV, with a ***combined*** audience of 2.25 million Americans, are barely worthy of notice. *See* Competition Report at Appendix F.[8] And, even though telephone companies are running from video faster than Michael Johnson can run the 200 meters, *See* Michael Katz, "Bell Atlantic, Nynex pull the plug on wireless deal," *Broadcasting & Cable*, December 16, 1996 at 18; Chris McConnell, Paul Farhi, "Waiting to Be Wired; With cable's promise of 500 channels and fast

---

Report at ¶86.

[5]Many of these DBS households are also cable households.

[6]The four major networks, however, had a combined 62 share. Competition Report at ¶86.

[7]Nickelodeon had 39 of the top 50 cable shows, which averaged between a 1.4 and a 3.4 share. USA network had four of the top 50, TNT had three, TBS had two, and WGNC and ESPN had one. Thus, only Nickelodeon, out of hundreds of cable networks, comes remotely close to being competitive with UPN or the WB.

[8]As of September, 1996, OVS had 2,190 subscribers. *Id.*

Internet access, looking more distant every day, the industry is being hammered on Wall Street. But the gloom may be overdone -- its phone and satellite rivals appear to have even farther to go," *Washington Post*, November 3, 1996 at H1; *Competition Report* at ¶79 ("Overall, while LECs may offer MVPD competition in some local markets in 1997, to date, LECs have yet to become a significant competitive presence.") some broadcasters continue to insist that they will soon become formidable competitors in the video market. *E.g.*, NBC Comments at 7; LSOC Comments at 40. Finally, as to the competitive impact of the Internet, the Commission found that "it is premature to assess the impact of the Internet on the video marketplace." *Competition Report* at ¶99.

Even with the duopoly rules in place, broadcasting, because it is free and universally accessible (and thereby can command far higher advertising revenues, *see* Braun, supra,) is far better off economically than its two most feared competitors. A recently released study by Veronis, Suhler and Associates shows that in 1995, the broadcast industry's revenues were $24.7 billion (up 8.8 percent from 1994), its operating income was $4.7 billion (up 7.6 percent) and its operating cash flow was $5.9 billion (up 9.4%). The report concluded that "[o]verall growth for 1993-95 was well in excess of the previous three-year period....Revenue growth...was driven by strong advertising spending, television station transaction activity and regulatory changes." Veronis, Suhler 14th Annual Communications Industry Report Fact Sheet: Television and Radio Broadcasting (found at http://www.vsacomm.com/pr/prtvracir96.htm). To the contrary, the cable industry is suffering -it is debt ridden and its stocks fell 30% in 1996. Farhi, "Waiting to Be Wired," *supra*. And it may be years, if ever, before the DBS industry turns a profit.

Nor do these competitors provide greatly expanded diversity of viewpoint. Just because these video providers use different technologies does not mean that they are providing different programming. Much of what is shown on cable is also shown on DBS, MMDS and SMATV. And broadcasters have substantial ownership interests many of those networks. For example, Disney/ABC has interests in ESPN, ESPN 2, ESPNews, E! the Entertainment Network, A&E, Lifetime, Disney Channel, the History Channel, Lifetime and Arts & Entertainment Network, General Electric/NBC has ownership interests in MSNBC, CNBC, A&E, American Movie Classics, History Channel, Independent Film Channel and E!, Fox has interests in the Fox News Channel, fX, FXM: Fox Movies, FOXSports Net; Westinghouse/CBS owns TNN, CMT, Tele-Noticias and Eye on People. Rich Brown, Broadcasters Connecting to Cable, *Broadcasting & Cable*, February 17, 1997 at 4-6; *see Competition Report* at Appendix G In addition, Viacom owns broadcast stations, the UPN network, VH-1, MTV, Music Television M2, Nickelodeon/Nick at Nite, Nick at Nite's TV Land, Showtime, The Movie Channel, and Flix, and co-owns the USA Network, Comedy Central, Sci-Fi Channel, All News Channel and the Sundance Channel. Viacom Comments at 2 n. 3. There is similar cross and multiple ownership in cable and DBS. In addition to its ownership interest in Primestar DBS, TCI has ownership interests in numerous cable networks, including, *inter alia*, Prime Sports, Home Team Sports, Sportschannel, Encore, STARZ!, Court TV, Discovery Channel, The Learning Channel, BET Cable Network, The Family Channel and the QVC Network. Rich Brown, "The long reach of John Malone and TCI," *Broadcasting & Cable*, October 16, 1995 at 38. Time Warner has interests in HBO, the WB Network, CNN, CNNfn and the Golf Channel.[9] *See* Mark Landler, "Cable

---

[9]LSOC cites to an economic study it has commissioned. LSOC's contractors base their determination that diversity would not be harmed by relaxation of the duopoly rules on the fact that we live "in a world where a single cable operator can control up to 500 channels in a local

Operators Are Losing Ground to the Programmers," *New York Times*, March 17, 1997 at D1.

Broadcasters' enumeration of the number of television stations on the air now as compared 30 years ago also fails the diversity test. *See, e.g.,* ALTV Comments at 4; NBC Comments at 1. While the number of stations has doubled, the proportion of those stations owned by group owners has grown even faster. Thus, the number of independently owned television stations may have actually *decreased* since 1964.

Finally, broadcasters' competitors provide little, if any, local programming. NBC points to PEG access and cable local news channels as evidence that cable provides local programming. NBC Comments at 6. But the fact is that only 16.5% of all cable systems have PEG access, and there exist perhaps 6 or 7 local or regional cable news channels and those are mostly situated in large urban areas. Pat Aufderheide, "Cable Television and the Pubic Interest," 42 Journal of Communication 52 (1992). Faced with that reality, LSOC makes the even more outrageous claim that because "national issues often address local needs and interests," cable news networks like CNN and C-SPAN and entertainment channels like MTV and the Family Channel should be counted in the mix when determining the amount of local diversity. LSOC Comments at 48-49. But whatever the merits of these networks, they simply do not address, on an ongoing basis, matters of local crime, local schools, local politics and local sports. Only local broadcast stations are required to provide that information in return for use of the public's airwaves.

---

market." LSOC comments at 56. But no such cable system exists. Indeed, most cable system operators have refused to expand their channel capacity much beyond 40 or 50 channels, with systems of 100 or more channels the rare exception to the rule. *Competition Report*, at ¶16 (14% of all cable systems offer 54 or more channels). And, of these channels, at most, one of them provides locally originated cable news.

2. Broadcasters ignore the imminent conversion to digital television.

In a lament typical of a number of the broadcasters' comments, the NAB states that "the Commission cannot take the position that only television station operations must be restricted to providing one channel." NAB Comments at 7. Similarly, LSOC complains that broadcasters are "single channel competitor[s] reliant strictly on advertising revenues." LSOC Comments at 76.

Even setting aside the fact that there are virtually no "single channel" broadcasters in today's deregulated environment, as of April, 1997, with or without relaxation of the duopoly rule, broadcasters will have the ability to become multichannel providers in every local market. Moreover, they will also have the ability to charge subscription fees for one, or maybe even all of those channels. That is because the FCC is giving broadcasters free, extra spectrum, to convert to digital television. The conversion will permit broadcasters to provide no less than 5 or 6 program feeds, and with compression technology changing on a daily basis, may permit them to do far more in the near future. Moreover, as discussed at p. 25, *infra*, digital television will equalize any alleged "handicap" that UHF stations now have, as the technical and economic shortfalls of analog UHF disappear in the digital world.

Even as the transition to digital sits on the broadcast industry's doorstep, even as the mainstream print media has picked up the pace in reporting on the transition, *e.g.*, Alan Murray, "Digital TV Giveaway Foils Campaign Reform," *Wall Street Journal*, March 17. 1997 at 1; Joel Brinkley, "Advanced TV Posing Issue of Timing," *New York Times*, March 10, 1997 at D1, not one broadcaster advocating relaxation of the duopoly rules mentions how the advent of digital will revolutionize television, and the ability of broadcasters to become multichannel providers.

Indeed, the words "digital television" do not even appear in many of these comments. Even more astonishing is Paxson Broadcasting's audacious demand that the Commission ***ignore*** digital television in considering relaxation of the duopoly rule. Paxson Comments at 17.

The Commission cannot, therefore, make any change to the duopoly rule without assessing the impact of digital television upon the broadcast industry. Despite the broadcasters' attempts to ignore DTV, the Commission must make it part of its analysis.

C. Unsubstantiated Promises of Public Service Are Not an Adequate Basis Upon Which the Commission May Relax the Duopoly Rule.

The broadcasters are almost universal in their assessment that relaxation of the duopoly rule will result in greater news and public interest programming. *E.g.*, HSN Comments at 11 ("Joint newsgathering might permit improvements in the quality of local news coverage" quoting *OPP Report*, 6 FCCRcd 3996 (1991)); Granite Comments at 7 (UHF- VHF combinations "will likely increase the diversity of programs and viewpoints offered by local UHF stations"); LSOC Comments at 62 ("duopolies are likely to prompt significant improvements in local television service").

But the Commission should not change the rule solely on the basis of broadcasters' vague, unsubstantiated and self-serving promises. No one disputes that duopolies result in "economies of scale." But there is no basis in history or logic to expect that any of those savings will be put into programming that benefits the public. While a few of the LMAs and other ownership waivers the Commission has granted have generated such programming, the vast majority have not.

For these reasons, the waiver standard that MAP, *et al.* set out in its Comments provides the only assurance that cost efficiencies will trickle down to the public. Under that standard, the Commission should grant waivers to the duopoly rule only in the most narrow and compelling of circumstances,[10] and only upon a specific ***and enforceable*** promise that the public will benefit from programming that goes beyond "public interest programming"[11] already required of a licensee.[12] To ensure that broadcasters comply with the terms under which they have obtained the waiver, the Commission should require biennial reports from broadcasters identifying the specific programming they have provided that meets those needs. Moreover, broadcasters should be required to notify the Commission, in writing, when it has made changes in programming or otherwise that do not comply with the terms upon which the waiver was granted.[13]

---

[10]MAP, *et al.* reiterate that they oppose any waiver based only on a public interest showing, *i.e.*, there must be some other compelling reason (*e.g.*, failed station) for granting the waiver.

[11]ALTV expresses concern about "public interest" waivers, whereby, they state "individual stations negotiate away their first amendment rights to program their stations in return for specific regulatory waivers." ALTV Comments at 32. This characterization ignores the basic principle that in the broadcasting context, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969). Thus, serving the public with better programming in return for an extraordinary waiver not only does no violence to a broadcaster's First Amendment rights, it promotes the those of viewers.

[12]Paxson lists suggestions for the type of public interest benefits broadcasters might provide to justify a duopoly waiver. Paxson Comments at 17-18. While MAP, *et al.* agree that the listed items would all benefit the public, they do not agree that a waiver should be granted if the promised benefit does not include some promise of public interest programming by the broadcasters. Therefore, "commitments to utilize minority or women-owned suppliers" Paxson Comments at 18, or "establishment of studios and other facilities in unserved communities," *id.*, would not be good cause for a duopoly waiver without the inclusion of some palpable programming benefit.

[13]In addition, any parties seeking to buy commonly owned stations should be required to attest that they will abide by the terms of the waiver granted to the assignor. Commenter Paxson argues that station combinations should be allowed to be sold in combination "without the need of additional showings," and that to do so would "penalize[] the assignor for successfully reviving a failed station." Paxson Comments at 18-19. MAP, *et al.* fail to see how a broadcaster that has been given an extraordinary waiver is penalized in the least when he sells two stations, instead of the one he would have had without the waiver. Moreover, to the extent that two

LSOC criticizes waivers because they cause "delays" and are "unpredictable," both of which are the enemies of "aggressive entrepreneurs." LSOC Comments at 78. ALTV and NAB voice a similar sentiment. ALTV Comments at 2; NAB Comments at 9. But all the things that make waivers bad for "aggressive entrepreneurs" make them good for members of the public. It will take the kind of scrutiny that MAP, *et al.* suggest to ensure that the diminution of diversity resulting from duopolies also provides some public benefit. Waivers have not diminished the zeal of broadcasters wishing to own a radio and television station in the same market, nor have they lessened the desire for broadcasters seeking interim duopoly waivers.

II. THE COMMISSION HAS THE AUTHORITY, AND THE DUTY, TO PROHIBIT LMAs EXCEPT IN THE MOST COMPELLING CIRCUMSTANCES.

The vast majority of parties supporting grandfathering and continuation of LMAs avoid the central tenet underlying MAP, *et al.'s* (and others') opposition to these arrangements, *i.e.*, LMAs are an illegal evasion of the Commission's ownership rules and a violation of the law prohibiting unauthorized transfers of control. Seen in this light, the preservation of LMAs is neither defensible under the plain language of Section 202(g) of the Telecommunications Act of 1996 nor as an equitable matter. If the Commission permits LMAs at all, it should only do so by a waiver request meeting the requirements spelled out at pp. *supra.*

A. Under the Plain Language of the 1996 Act, the Commission May Refuse to Grandfather LMAs, and May Limit Them to Their Current Terms.

Parties supporting LMAs argue that the plain language of the 1996 not only requires the Commission to grandfather LMAs, but also prohibits the agency from limiting LMAs to their

---

stations conditioned on the waiver terms may be worth less than one without, that is the sacrifice the assignor must make to ensure that the public continues to benefit from the combination of stations.

current terms. *E.g.* Sinclair Comments at 4-6; Paxson Comments at 34; ALTV Comments at 33-35. Quoting from the plain language of Section 202(g) of the 1996 Act, which permits the Commission to grandfather those LMAs that are "in compliance with the rules of the Commission," those parties argue that since nothing in the Commission's current rules prohibit LMAs, then they must be grandfathered. *E.g.* Sinclair Comments at 5; ALTV Comments at 34.

This argument turns the nature of LMAs, and the Commission's rules, on its head. While the Commission has no rule explicitly prohibiting LMAs, LMAs have always violated, and still violate, the Commission's ownership rules. *See* MAP, *et al.* Comments at pp. 27-30. They do so by permitting a station owner same market to have complete control over the programming of another station in the same market. In addition, they violate 47 USC §310(d) and the Commission's rules promulgated thereunder, which prohibit unauthorized transfers of control.[14] Thus, the Commission may reasonably determine that LMAs should not be grandfathered or

---

[14]Paxson argues that "there is absolutely nothing in the legislative history of Section 310(d)....that...grants the Commission authority over LMAs and overrides Section 202(g)'s clear statutory mandate. Section 310 (d) was enacted well before LMAs were a recognized industry concept and for a specific purpose--to ensure that the Commission only review the qualifications of the assignee or transferee filing an application. *MMM Holdings Inc.*, 4 FCC Rcd 6838, 6839 (1989)...." Paxson Comments at 35. The Commission must reject this cramped view of Section 310 (d). The plain language of Section 310(d) gives the Commission authority over all transfers and assignments, including, naturally, those that are unauthorized. Whether the unauthorized transfer is made via an LMA or some other method is irrelevant. As Paxson's own characterization of *MMM Holdings* states, the Commission's consideration under Section 310(d) is whether a transfer or assignment "will serve the public interest convenience and necessity"). Surely, the Commission has the authority to determine that LMAs do not serve the public interest. Under Paxson's logic, however, the Commission could not so determine, since the public interest standard preceded LMAs! Moreover, Paxson is wrong in asserting that Section 310 (d) somehow conflicts with Section 202(g). The later section permits grandfathering of those LMAs that are "in compliance with the regulations of the Commission." As discussed *supra* at p. 17, LMAs are not in compliance with the Commission's ownership regulations and its regulations prohibiting unauthorized transfers of control under Section 310(d).

renewed because they are not "in compliance with the rules of the Commission."[15]

B. Those Broadcasters Which Entered Into LMAs Did So at Their Own Risk.

In the alternative, broadcasters argue that it would be inequitable not to grandfather LMAs, because those broadcasters entered into these arrangements "in good faith" reliance on the lack of Commission regulation in this area. *E.g.* NAB Comments at 21. Paxson similarly argues that broadcasters "reasonably relied on an existing regulatory scheme in taking risks to provide expanded service." Paxson Comments at 30.

Paxson's feigned surprise at the thought that LMAs are of uncertain legality is, to be polite, insincere. Paxson is only half right - any broadcaster entering into an LMA over the past 5 years ***has*** taken a risk. But Paxson is wrong to assert that its, and others' reliance on Commission inaction in this area was at all ***reasonable***. As described below, broadcasters have been on unmistakable notice, at least as far back as mid-1991, that the Commission might nullify, or modify, these arrangements. Since that time, questions about the validity and legality of TV LMAs have been debated, publicly, by the Commission, Congress, the media and broadcasters' attorneys. *See, e.g.*, Ailing Station Buying Time with LMAs, Broadcasting & Cable, Sept. 30, 1991 at 40 (some broadcasters oppose LMAs because they provide a way to circumvent the duopoly rules); Doug Halonen, Representatives move to block bulk time sales, *Electronic Media*,

---

[15]Not content with making a statutory argument, LSOC invokes the Constitution as well. It argues that not permitting parties to renew an LMA "rob[s] parties of the ability to gain a full return on their investments," and that this "is tantamount to a taking without compensation." LSOC Comments at 88. But because the public owns the airwaves, there is no investment interest in a broadcast license. 47 USC §304 ("No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same...." Therefore, broadcasters cannot be compensated for something it never owned in the first place.

November 11, 1991 at 3-4 (FCC Commissioner Duggan: LMA's "make mincemeat of our ownership rules and threaten the important public interest goal of localism"); Norman Fischer, Monday Memo, *Broadcasting & Cable*, June 15, 1992 at 63 ("In actuality, leasing stations directly contradicts the spirit of duopoly as defined by the FCC's own regulations****[T]here has been a great deal of opposition to LMA's, particularly by minority broadcasters...[i]n addition, there are broadcasters who do not see this policy as being in the best interest of the broadcasting industry as a whole."); Steve McClellan and Dave Tobenkin, Broadcasters Battle over LMAs, *Broadcasting & Cable*, February 6, 1995 at 8 (LMAs "are the subject of a fiery debate within the broadcasting industry****[some broadcasters] say the LMAs allow some, and only some, an opportunity to circumvent the duopoly rules.")

At the very latest, broadcasters should have been aware of the uncertain regulatory future of TV LMAs in May, 1991, when the Commission sought comment on whether to place limits on radio LMAs. *Notice of Proposed Rulemaking*, 6 FCC Rcd 3275, 3281-82 (1991). In April 1992, the Commission decided to attribute LMAs for purposes of the ownership rules if a broadcaster provided 15% or more of the programming for another station. *Report and Order*, 7 FCC Rcd 2755, 2788 (1992). The status of TV LMAs was questioned again, shortly thereafter, when a Washington law firm that representing broadcast clients sought clarification of the Commission's *Report and Order* as to whether the Commission's ruling on radio LMAs also applied to TV LMAs. *Petition for Reconsideration of Leventhal, Senter & Lerman* in Docket No. 91-140. The Commission responded in the negative, but stated that "[o]ur rules will be revised accordingly. This issue is currently being explored in the Commission's television ownership proceeding." *Memorandum Opinion and Order and Further Notice of Proposed*